IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6030

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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HENRY WILLIS, III,

Petitioner,

v.

CHARLES BALKCOM, Warden,

Respondent.

ORIGINAL COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Was the imposition of Petitioner's death penalty constitutional?

Did Petitioner waive his right to challenge the constitutionality of Ga. Code Ann. § 38-801(d)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i.
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	
A. THE IMPOSITION OF PETITIONER'S DEATH PENALTY WAS CONSTITUTIONAL.	5
B. PETITIONER WAIVED HIS RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF GA. CODE ANN. § 38-801(d).	6
CONCLUSION.	7
CERTIFICATE OF SERVICE.	8

TABLE OF AUTHORITIES

Cases Cited: Page

Godfrey v. Georgia, ___ U.S. ___ (1980). 5

Westbrook v. Balkcom, ___ U.S. ___ (1980) (Justice Stevens concurring). 5

Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979), cert. denied, ___ U.S. ___ (1979). 4

Statutes Cited:

Ga. Code Ann. § 27-2534.1(b)(7). 5

Ga. Code Ann. § 38-801(d). 6

28 U.S.C. § 2254 6

Rules Cited:

F.R.Civ.P. 45(c) 6

STATEMENT OF THE CASE

Nearly all of the material facts of this case are undisputed. On the evening of February 11, 1976, Son Fleming borrowed the car belonging to Terry Coney, which was a Ford Fairlane with Georgia tag number GBO-282. (T.T. 104-06). [1/] Fleming picked up his nephew, Larry Fleming, and Petitioner Henry Willis, and they made plans to commit an armed robbery. (T.T. 331, 593). That evening they drove to the store of Farrell Kent in Adel, Georgia; and while Son Fleming waited in the car, Petitioner and Larry Fleming went inside. (T.T. 114, 331, 585, 594).

Petitioner was armed with his .22 pistol, and he told Kent, "I'll kill your ass if you don't do what I tell you." (T.T. 114-15, 595). Larry Fleming looked behind the counter while Petitioner took the drawer out of the cash register. (T.T. 116). Kent put the money, including one-half of a dollar bill, in a sack, and Petitioner said, "You're going with me." (T.T. 116-17). However, when Larry Fleming mentioned there was someone outside, Petitioner then told Kent, "I'll be back." (T. 117). After Petitioner and Larry Fleming took the money and left, Kent phoned the police. (T.T. 117-18, 331). The robbery was reported to Adel Police Dispatcher Andrew Moody. (T.T. 167-68).

February 11, 1976 was intended to be the last day of work for Ray City Police Chief James Giddens, as he had already tendered his resignation. (T.T. 90, 92). When Petitioner and the Flemings fled Adel, they drove through Ray City, where they were stopped by Giddens. (T.T. 126-27, 174, 331, 585, 595). Before Giddens got out of his car, he made a radio transmission to the Nashville Police Department that he had stopped a red and white Ford, tag number GBO-282, with two black men in it. (T.T. 186-87).

1/ The record in this case consists of 38 volumes, which contain 12,401 pages. T.T. refers to the trial transcript, which consists of four volumes totaling 1,151 pages.

Giddens searched Coney's car and when he found the robbery money, Petitioner and the Flemings grabbed Giddens and disarmed him. (T.T. 332, 586, 596). They put Giddens into Coney's car and began driving. (T.T. 332, 596). Near a swamp in Lanier County, Son Fleming stopped and ordered Giddens out of the car. (T. 332, 586, 597). Giddens tried to run into the swamp, and Son Fleming began shooting at him with the policeman's .357 magnum.

Giddens was hit in the arm and abdomen, but these wounds were not fatal. (T.T. 332, 359, 361, 381-82, 386, 586). As Giddens lay wounded in the swamp water, Petitioner and Larry Fleming waded out to him. (T.T. 332, 586, 598). Petitioner took the .22 pistol and shot Giddens in the head five times at point blank range. (T.T. 274, 332, 350, 375, 586, 598). 2/

Giddens was shot in the right temple, right cheek, the middle of his forehead, left temple, and left eye. (T.T. 375-76). When he had been shot in the left temple, the pistol had been placed against his head; and this wound was the cause of death. (T.T. 365, 377, 383, 386).

Because Giddens made no other radio transmissions and did not return to his original location in Ray City, the Nashville Police Department asked Berrien County Deputy Sheriff James Rowan to check on Giddens. (T.T. 127). Giddens' abandoned police car was found, and a statewide alert was placed for Coney's car. (T.T. 128-29, 174-75, 187, 192-93).

Mike Dailey heard a description of the car, and about ten minutes later, he saw it. (T.T. 197-98). Dailey had a CB radio in his vehicle; and as he followed the car, he radioed for someone to phone the police. (T.T. 198-99).

2/ Petitioner's statements were contradictory as to whether Larry Fleming ever shot Giddens. In his original confession Petitioner said he shot Giddens three times and then handed the gun to Larry Fleming who shot Giddens until the pistol was empty. (T.T. 332). Later Petitioner repudiated that part of his confession and said Larry Fleming never shot Giddens. (T.T. 350). At trial Petitioner testified he shot Giddens three times, and then Larry Fleming shot Giddens.

Brooks County Deputies Willie Jones and Richard Weaver received a call giving the location of the car, and when they saw it, they turned on their blue light. (T.T. 210-12, 233-34). The car stopped, and the deputies yelled for the people in it to get out. (T.T. 202, 212-13, 233-34). Son Fleming, who was driving, got out first; and Petitioner got out second. (T. 214-15). As Deputy Jones walked toward the car, he saw Larry Fleming hiding in the car and ordered Fleming out of the car. (T.T. 215-16, 235-246).

Weaver advised the three men of their constitutional rights and asked them where Chief Giddens was. (T.T. 217, 235-36). Son Fleming gave Jones consent, later reduced to writing, for Jones to search the car. (T.T. 218, 222, 238). In the car Jones found Giddens' .357 magnum, Petitioner's .22 pistol, a roll of quarters, and a sack of bills which included one-half of a dollar bill, which matched the other half in Farrell Kent's possession. (T.T. 92-93, 99, 119, 223-24, 295, 611).

At first Petitioner and the two Flemings denied any knowledge of Giddens' whereabouts. (T.T. 217, 235, 654). However, they eventually led police officers to the swamp, where Giddens' body was recovered about 6:00 a.m., February 12, 1976. (T.T. 131, 134-35, 268, 314-15, 323).

After the trial court quashed Petitioner's 1976 indictment (R. 650 - 58), [3/] Petitioner was reindicted by a Lanier County grand jury on August 15, 1977 for the murder of Giddens. (R. 661-62). The trial court granted Petitioner's motion for a change of venue (R. 843-52), and venue was changed to Bleckley County. (R. 879).

3/ R. refers to the three volumes of pleadings, which total 1,021 pages.

The jury found Petitioner guilty of murder and found three aggravating circumstances:

1. The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

2. The offense of murder was committed against a peace officer while engaged in the performance of his official duties;

3. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of himself or another.

The death penalty was imposed, and Petitioner's conviction and sentence were affirmed on direct appeal. Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979), cert. denied, ___ U.S. ___ (1979).

Petitioner was denied habeas corpus relief by the Superior Court of Tattnall County, and the Georgia Supreme Court denied a certificate of probable cause to appeal.

REASONS FOR NOT GRANTING THE WRIT

A. THE IMPOSITION OF PETITIONER'S DEATH PENALTY WAS CONSTITUTIONAL.

It is undisputed that Petitioner murdered a police officer and did so to avoid a lawful arrest. Petitioner does not challenge the validity of two of the aggravating circumstances but alleges the statutory aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied to Petitioner.

Ga. Code Ann. § 27-2534.1(b)(7) provides the death penalty may be imposed if the "murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey v. Georgia, ___ U.S. ___ (1980), this Court vacated a death penalty imposed for the shotgun slaying of two persons. Both victims died instantly, and the only aggravating circumstance was that set forth in Ga. Code Ann. § 27-2534.1.

In Petitioner's case, he was a party to a previously inflicted serious physical injury prior to the firing of the fatal shots. Chief of Police Giddens had been shot and wounded and was lying helpless in the water when Petitioner waded up to him and fired five shots into Gidden's head.

Moreover, even if § 27-2534.1 were applied unconstitutionally to Petitioner, the existence of two other aggravating circumstances, each established beyond a reasonable doubt, constitutionally supports the death penalty in Petitioner's case. Westbrook v. Balkcom, ___ U.S. ___ (1980)(J. Stevens concurring).

B. PETITIONER WAIVED HIS RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF GA. CODE ANN. § 38-801(d).

Ga. Code Ann. § 38-801(d) provides that for a civil subpoena to be binding on a person residing outside the county, a $10.00 witness fee and $.20 per mile traveling expenses must be tendered with the subpoena. The federal practice is that for a civil subpoena to be binding, a tendering of fees and mileage is necessary. F.R.Civ.P. 45(c).

At Petitioner's State habeas hearing on May 30, 1980, the only two witnesses he subpoenaed appeared in Court. In open court counsel for Petitioner admitted he had not subpoenaed any other witnesses "because we knew we wouldn't get to their testimony for today." (State habeas transcript 79).

Since Petitioner had no intention and made no attempt to subpoena any witnesses for May 30, 1980, other than the two that appeared, he has no standing to complain that the requirement of the tendering of witness fees and mileage unconstitutionally deprived him of a full and fair State habeas hearing.

If Petitioner did not receive a full and fair State habeas hearing, the forum to raise his claim is not on a petition for writ of certiorari but is in the District Court by a federal habeas corpus petition. See 28 U.S.C. § 2254.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for relief have been set forth by Petitioner.

Respectfully submitted,

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